No. 94346-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MURRAY,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

Michael Murray, a brain injured man suffering from an inability to control his impulses, was convicted of three counts of indecent exposure. His sentence was increased based on the jury's finding of two statutory aggravating factors: "rapid recidivism" and "sexual motivation." Consistent with United State Supreme Court precedent, this Court should hold that aggravating factors are subject to void for vagueness challenges under due process. Because the rapid recidivism factor is unconstitutionally vague and the sexual motivation factor does not apply to the offense of indecent exposure, Mr. Murray's exceptional sentence should be reversed and all reference to these aggravators stricken.

B. ISSUES

1. The void for vagueness doctrine applies to elements of a criminal offense and statutes fixing sentences. Statutory aggravating factors found by juries are the functional equivalent to essential elements of an offense and are used to increase punishment. Are aggravating factors subject to vagueness challenges?

2. The "rapid recidivism" aggravating factor requires a finding that the defendant committed the offense "shortly after" being released from incarceration. No guidance was provided to the jury in Mr. Murray's case on what factors were relevant in making this determination. Mr.

Murray committed the acts of indecent exposure about two to three weeks after his release, but he first sought professional help twice earlier and did not recidivate in those weeks despite opportunities. As applied to Mr. Murray's case, is the rapid recidivism aggravator void for vagueness because it is so standardless that it invites arbitrary enforcement?

3. The sexual motivation aggravating factor cannot be used to aggravate sentences for crimes that are inherently sexual. Indecent exposure requires an "obscene" exposure of a person's sexual organs. For an act to be obscene, it must be sexual. Did the sentencing court improperly impose an exceptional sentence for indecent exposure based on the jury's findings of sexual motivation?

C. STATEMENT OF THE CASE

Michael Murray suffered a serious stroke in mid-2008, resulting in brain damage. Ex. 12 at 2; RP 500. This affected his cognitive functioning, including his ability to control himself. Ex. 12; RP 501-02. Consequently, Mr. Murray committed multiple acts of indecent exposure in the following years. See RP 4-30, 38-46, 84-93, 609; CP 74.[1]

A week following his release from jail on February 17, 2015, Mr. Murray sought professional medical help. RP 476-77; Ex. 13 at 3. He

[1] Evidence of these acts were admitted at trial for ER 404(b) purposes. Before his stroke in 2008, Mr. Murray had prior incidents of similar behavior, but the problem was exacerbated after his stroke. RP 540. Mr. Murray was convicted of indecent liberties in 2011. Ex. 19.

returned for followup care on March 2, 2015. Ex. 14 at 1. In December 2014, while Mr. Murray was in custody, he had been examined by Dr. Craig Beaver, a forensic psychologist. Ex. 12; RP 496-99. Dr. Beaver recommended medication to help Mr. Murray control himself and reduce his sexual urges, but Mr. Murray was not prescribed medications when released. Ex. 12 at 2, 8; RP 516-17. Mr. Murray provided Dr. Beaver's report to the medical professionals during his visit in March, but he was diagnosed simply with depressive disorder and provided a prescription only for an anti-depressant. Ex. 14 at 3; RP 518.

In three separate acts occurring on March 4, 5, and 9, 2015, Mr. Murray exposed his penis to three different women. CP 17-18, 96. In two of these acts, Mr. Murray was touching himself. RP 332, 343, 452, 390-92. Mr. Murray was charged with three counts of indecent exposure. CP 17-18. The State alleged the offenses were sexually motivated and committed shortly after Mr. Murray's release (i.e., "rapid recidivism"), either of which may justify an exceptional sentence. CP 17-18. Mr. Murray presented a diminished capacity defense and elicited expert testimony showing he lacked inhibitive control. RP 522; CP 89 (instruction explaining that evidence of mental illness or disorder may be taken into consideration in determining capacity to form knowledge). The jury convicted Mr. Murray as charged, finding the offenses were sexually

motivated and that they were committed shortly after Mr. Murray had been released from incarceration. CP 59-64. Based on these findings, the court imposed an exceptional sentence of three years in prison. CP 97-99; 12/10/15RP 11-12.

Among other arguments, Mr. Murray argued on appeal that the "rapid recidivism" aggravating factor was void for vagueness as applied to him and that the sexual motivation finding could not be used to aggravate a sentence of indecent exposure. After the Court of Appeals rejected these challenges, this Court granted review on these issues.

D. ARGUMENT

1. The "rapid recidivism" aggravating statute is unconstitutionally vague and was improperly used to aggravate Mr. Murray's sentence.

a. The void for vagueness doctrine applies to aggravating factors.

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process of law. Const. art. I, § 3; U.S. Const. amends. V, XIV. When "a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," it violates due process. Johnson v. United States, __ U.S.__, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015). The void for vagueness doctrine applies "not only to statutes

defining elements of crimes, but also to statutes fixing sentences." Id. at 2557.

In Johnson, the United States Supreme Court applied the vagueness doctrine to the residual clause of the federal Armed Career Criminal Act (ACCA). Id. at 2555. When applicable, this provision increased a sentence from a statutory maximum of 10 years to a minimum of 15 years. Id. The provision was triggered if the defendant had three or more convictions for a "violent felony." Id. Under the residual clause of the ACCA, "violent felony" included a crime that "involves conduct that presents a serious potential risk of physical injury to another." Id. The court held that imposing an increased sentence under this provision violated the prohibition against vague laws. Id.

The United States Supreme Court recently considered a similar issue in Beckles v. United States, __ U.S. __, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). Beckles involved a vagueness challenge to the federal sentencing Guidelines, specifically a provision similar to the one held vague in Johnson. Although once mandatory, the Guidelines are advisory. Beckles, 137 S. Ct. at 999; see United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Thus, even though the language of the provision in Beckles was similar to the provision in Johnson, it did "not fix the permissible range of sentences." Beckles, 137

S. Ct. 892. Rather, it simply guided sentencing "courts in exercising their discretion." Id. at 894. Given their advisory nature, the Supreme Court held the Guidelines were not subject to due process vagueness challenges. Beckles, 137 S. Ct. at 892, 894.

As recognized by Justice Sotomayor in her concurring opinion, however, this holding does not resolve the question of whether a different result is required in mandatory sentencing schemes (like Washington's). Id. at 903 n.4 (Sotomayor, J., concurring). Unlike mandatory sentencing schemes, purely discretionary schemes do not trigger the void for vagueness doctrine. Id. at 895 ("we have never suggested that unfettered discretion can be void for vagueness.").

Washington sentencing law is structured differently than federal sentencing law. It is a mandatory sentencing scheme. Under the Sentencing Reform Act (SRA), a court must generally impose a sentence within the standard range. RCW 9.94A.530. To impose an exceptional sentence outside the standard range, there must be "substantial and compelling reasons." RCW 9.94A.535. Aggravating circumstances may constitute substantial and compelling reasons to impose an exceptional sentence above the standard range. Id. Excluding a few exceptions, aggravating circumstances must be found by the jury and proved beyond a reasonable doubt. RCW 9.94A.535(2), (3); RCW 9.94A.537.

This scheme is designed to respect the constitutional rights of defendants and comply with the United States Supreme Court's ruling in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Laws of 2005, ch. 68, § 1; State v. Stubbs, 170 Wn.2d 117, 130, 240 P.3d 143 (2010). The United States Supreme Court has recognized that, excluding the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Blakely, 542 U.S. at 303. Simply put, a court's sentence must be authorized by the jury's verdict. See id. at 305 n.8.

The key rationale to the Apprendi and Blakely decisions is the recognition that facts which increase the punishment for an offense are equivalent to essential elements. Apprendi, 530 U.S. at 494 n.19; Alleyne v. United States, 133 S. Ct. 2151, 2162, 186 L. Ed. 2d 314 (2013) ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

It follows that the aggravating factors listed in RCW 9.94A.535(3)—when used to justify an exceptional sentence—are the functional equivalent to elements of a criminal offense. Therefore, they are subject to vagueness challenges, just like standard elements of a criminal offense. See Beckles, 137 S. Ct. at 899 (Sotomayor, J., concurring) ("A statute fixing a sentence imposes no less a deprivation of liberty than does a statute defining a crime, as our Sixth Amendment jurisprudence makes plain.") (citing Apprendi, 530 U.S. at 490).

Were it otherwise, the legislature could avoid the void for vagueness doctrine through clever drafting. The legislature could simply transfer any arguably vague fact of the offense and make it an "aggravator" instead. Due process forbids this kind of runaround. See Apprendi, 530 U.S. at 492-93 (hate crime enhancement statute imposed "an intent requirement necessary for the imposition of sentence" and thus was required to be found by jury). The "relevant inquiry is one not of form, but of effect . . ." Id. at 494. Therefore, because aggravators are effectively elements, they are subject to void for vagueness challenges.

Unfortunately, in a case predating Blakely, this Court reached a contrary conclusion in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). In reaching this conclusion, the Court reasoned that aggravating factors do not "vary the statutory maximum and minimum penalties

assigned to illegal conduct by the legislature." Baldwin, 150 Wn.2d at 459. But Blakely reasons otherwise. Blakely, 542 U.S. at 306-07. This Court also incorrectly reasoned that no "liberty interest" was implicated by an aggravating factor. Baldwin, 150 Wn.2d at 460. Apprendi, however, was grounded in due process and cited to the due process requirement that the government prove all the facts necessary to support criminal punishment beyond a reasonable doubt. Id. at 476, 484.[2] Finally, Baldwin reasoned the vagueness doctrine did not apply because the sentencing court had broad discretion to impose an exceptional sentence so long as it articulated a substantial and compelling reason. Baldwin, 150 Wn.2d at 461. Under Blakely, this is no longer true and is inconsistent with the court's reasoning that it "did not matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure." Blakely, 542 U.S. at 305 n.8.

This Court is bound to follow the United State Supreme Court on federal constitutional issues. Cooper v. Aaron, 358 U.S. 1, 18-19, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958); State v. Radcliffe, 164 Wn.2d 900, 907, 194 P.3d 250 (2008) (rejecting earlier Washington precedent in light of

[2] In 2013, this Court declined to address whether Baldwin survived Blakely, reasoning that the vagueness challenge in that case to the aggravator failed even assuming the vagueness doctrine applied. State v. Duncalf, 177 Wn.2d 289, 296, 300 P.3d 352 (2013). To provide guidance and settle the issue, the issue should be addressed now.

subsequent United States Supreme Court precedent). Baldwin is inconsistent with the Apprendi line of cases and the Supreme Court's recognition in Johnson that sentencing statutes are not immune to the vagueness doctrine. Accordingly, this Court should conclude that Baldwin is no longer good law and hold that aggravating factors are subject to void for vagueness challenges.

b. As applied in Mr. Murray's case, the "rapid recidivism" aggravating factor is void for vagueness.

"[T]he most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Absent meaningful standards, enforcement or application of the law is arbitrary. For example, the phrase "contemptuous treatment," as used in a statute punishing misuse of a flag, was "of such a standardless sweep [that it] allow[ed] policemen, prosecutors, and juries to pursue their personal predilections." Id. at 575 (emphasis added).

The issue is whether the so-called "rapid recidivism" aggravating factor is impermissibly vague. State v. Combs, 156 Wn. App. 502, 505, 232 P.3d 1179 (2010). As set out in the statute, this factor requires the jury to find that "[t]he defendant committed the current offense shortly

after being released from incarceration." RCW 9.94A.535(3)(t) (emphasis added). Here, the jury was similarly instructed to answer whether Mr. Murray "committed the crime shortly after being released from incarceration." CP 85-87.

The jury, however, was provided no related instruction to assist it in making this determination. This is not entirely surprising because the legislature has not provided any definitions for this aggravator. But when enacting this and other aggravating factors, the legislature expressed that it intended to codify existing common law aggravating factors. Laws of 2005, ch. 68, § 1; Stubbs, 170 Wn.2d at 130-31. In 1994, the Court of Appeals recognized "rapid recidivism" as an aggravating circumstance that could justify an exceptional sentence. State v. Butler, 75 Wn. App. 47, 54, 876 P.2d 481 (1994). The "gravamen of the offense is disdain for the law." Combs, 156 Wn. App. at 506 (citing Butler, 75 Wn. App. at 54). What constitutes a short period of time is fact-specific and varies depending on circumstances. Combs, 156 Wn. App. at 506-07. Some crimes require lengthy preparation while others do not. Id. Opportunity to commit the offense is also a factor. Id. at 507.

In Combs, the Court of Appeals held that the rapid recidivism aggravator had improperly been found by the trier of fact (a judge) to an attempting to elude offense committed six months after the defendant's

release from incarceration. Id. at 505-07. The appellate court recognized that six months was not a short period of time. Id. at 506. The court reasoned that attempting to elude was an impulse crime and there was no preparation by the defendant in committing the crime. Id. at 506-07.

The "failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." Johnson, 135 S. Ct. at 2558 (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 91, 41 S. Ct. 298, 65 L. Ed. 516 (1921)). That the trier of fact in Combs (a learned judge) reached a manifestly incorrect conclusion on the rapid recidivism aggravator is evidence that the language of RCW 9.94A.535(3)(t) is impermissibly vague. Cf. Johnson, 135 S. Ct. at 2558 ("this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy."). Without additional clarification (such as that provided in Combs), a jury is forced to arbitrarily decide what "shortly after" means.

Indeed, this is what happened in this case. During closing argument, the prosecutor himself recognized the subjectivity of the "rapid recidivism" aggravator, telling the jurors it was up to them to determine what "shortly after being released from incarceration" meant:

> There's another question you will have to answer when you go back to deliberate, and that's whether the Defendant committed the crime shortly after being released from

> incarceration. You have no further instructions on that. Quite frankly, it's up to you to determine what shortly or after, excuse me, shortly after being released from incarceration is. So what facts do we have regarding that?

RP 673 (emphasis added).

Here, the offense at issue was indecent exposure. As explained in greater detail below, this is an inherently sexual offense because it requires an "obscene" exposure of a person's genitals. RCW 9A.88.010(1). Thus, it is generally a crime of impulse. In Mr. Murray's case, the evidence indicated the offenses were of a sexual nature and were committed due to impulses he had difficulty controlling. The offenses occurred about two to three weeks after Mr. Murray's release. Trying to control his impulses, Mr. Murray sought professional medical help twice following his release and prior to committing the first offense on March 4, 2015.

In determining whether this fact pattern constituted "rapid recidivism," the jury was provided no guidance. Although further instructions might have been crafted based on Combs, the jury did not have an instruction explaining what the law required. Rather, the jury was simply asked to decide if Mr. Murray had committed the three offenses "shortly after" his release. Without any "minimal guidelines," the jury was free to find this aggravator based on its own "personal predilections." Goguen, 415 U.S. at 574-75. Lawmakers may not "abdicate their

responsibilities for setting the standards of the criminal law." Id. at 575. Because the language of RCW 9.94A.535(3)(t) gives the finder of fact an "inordinate amount of discretion," it is unconstitutionally vague. See State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995) ("only if the statute invites an inordinate amount of discretion is it unconstitutional.").

As applied to Mr. Murray, the statute is unconstitutional. See City of Spokane v. Douglass, 115 Wn.2d 171, 181, 795 P.2d 693 (1990) (discussing as applied versus facial challenges to statutes). But even if Mr. Murray's challenge is construed as a facial challenge, the result would be the same. As the United States Supreme Court clarified, its "*holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." Johnson, 135 S. Ct. at 2561. Hence, that there existed some clearly risky crimes falling within the statute at issue in Johnson did not save the statute from being ruled unconstitutionally vague. Id. The same reasoning applies in this case.

This case is materially distinguishable from State v. Williams, 159 Wn. App. 298, 244 P.3d 1018 (2011). There, the Court of Appeals rejected a vagueness challenge to the rapid recidivism aggravator. Williams, 159 Wn. App. at 319-20. The defendant committed an assault one day after his release from King County jail after serving a sentence.

Id. at 320. In contrast, this case involves a much longer period, a different offense, and mitigating evidence explaining Mr. Murray's behavior and proving he sought professional help.

This Court should hold that RCW 9.94A.535(3)(t) is void for vagueness, vacate the rapid recidivism findings, and reverse the exceptional sentence.

2. Mr. Murray's sentence for indecent exposure was improperly aggravated by the sexual motivation aggravator.

a. The sexual motivation aggravating factor applies only to non-sexual offenses.

"Sexual motivation" is a statutory aggravating factor that may support an exceptional sentence. RCW 9.94A.535(3)(f). "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(47). Prosecutors are directed (but not required) to file special allegations of sexual motivation in every case that supports it. RCW 9.94A.835(1); State v. Rice, 174 Wn.2d 884, 889, 279 P.3d 849 (2012).

"[A]n exceptional sentence may not be based on factors inherent to the offense for which a defendant is convicted." State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999); see, e.g., Stubbs, 170 Wn.2d at 130-31 (severity of victim's injury could not be used to aggravate offense

of first degree assault because inherent in the offense was the requirement of great bodily harm).

Applying this rule to the sexual motivation aggravating factor, this aggravator "logically applies only to offenses that are not inherently sexual in nature." Thomas, 138 Wn.2d at 636. This makes sense because the "purpose of 'sexual motivation' as an aggravating factor is to hold those offenders who commit sexually motivated crimes more culpable than those offenders who commit the same crimes without sexual motivation." Id. Consistent with this rule, the legislature provided that sexual motivation findings do not apply to any "sex offense" as defined by RCW 9.94A.030. RCW 9.94A.835(2). The offense of indecent exposure is not an enumerated "sex offense" under RCW 9.94A.030(47).[3] Although not an enumerated sex offense, indecent exposure is an inherently sexual crime and therefore should not be subject to the sexual motivation aggravating factor. See Thomas, 138 Wn.2d at 636.

b. The offense of indecent exposure is inherently a sexual offense and is not subject to the sexual motivation aggravating factor.

"A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person

[3] Despite its inherent sexual nature, patronizing a prostitute is also not an enumerated "sex offense." RCW 9A.88.110.

of another knowing that such conduct is likely to cause reasonable affront or alarm." RCW 9A.88.010(1) (emphasis added).

The word "obscene" is not defined by statute. In interpreting the predecessors to RCW 9A.88.010(1), however, Washington courts have given the term a sexual connotation. For example, this Court interpreted the phrase "obscene exposure" as meaning "a lascivious exhibition" of a person's "private parts." State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966). "Private parts" means genitalia. State v. Vars, 157 Wn. App. 482, 491 n.15, 237 P.3d 378 (2010) (acknowledging that "RCW 9A.88.010 requires an exposure of genitalia in the presence of another"). "Lascivious" is defined as "inclined to leachery; lewd, lustful" or "tending to arouse sexual desire: libidinous, salacious." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1274 (2002) (capitalization omitted); see also State v. Queen, 73 Wn.2d 706, 710, 440 P.2d 461 (1968) ("'(L)ascivious,' and 'indecent' are synonyms and connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.") (quoting Boles v. State, 158 Fla. 220, 221, 27 So.2d 293 (1946)). Unsurprisingly, "obscene exposure" has been defined for at least one jury as meaning "the exposure of the sexual or intimate parts of one's body for a sexual purpose." State v. Steen, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010).

It follows that the crime of indecent exposure is inherently sexual. In its appellate briefing, the State took the contrary position and offered a list of supposed examples. Br. of Resp't at 15. This included streaking across a college campus, riding a bike naked in a parade, and protesting nude. Br. of Resp't at 15. But the indecent exposure statute forbids *obscene* exposures, not nudity. Under the State's theory, a nude model's exposure of his or her private parts in a figure drawing class is a crime.[4]

Indeed, public nudity is constitutionally protected, albeit limited. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 138, 937 P.2d 154 (1997). For example, because it is communicative, nude dancing is protected expression under the state and federal constitutions. JJR Inc. v. City of Seattle, 126 Wn.2d 1, 6, 891 P.2d 720 (1995).

Under the First Amendment, the government may not outlaw sexual material unless it is "obscene." Roth v. United States, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). The "obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 792-93, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("speech about violence is not obscene."). Thus, under First Amendment jurisprudence, obscenity is tied to sexual conduct. Reading

[4] See https://en.wikipedia.org/wiki/Figure_drawing.

the indecent exposure statute to include non-obscene (i.e., non-sexual) acts would create significant constitutional problems and call into question the validity of the statute. The canon of constitutional avoidance cautions against this. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010) (statutes are construed to avoid constitutional deficiencies); see State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013) (statutes outlawing threatening language are interpreted as forbidding only true threats).

The Court of Appeals acknowledged that a "lascivious" exhibition is sexual in nature. Op. at 7 n.1. Nevertheless, the court held the sexual motivation aggravator could still apply, reasoning that an "obscene" exposure did not necessarily require sexual gratification. Op. at 7-8 & n.1. But this Court in Thomas reasoned that the sexual motivation factor only applied to offenses that are *not* inherently sexual. Thomas, 138 Wn.2d at 636. This Court did not say that the sexual motivation factor only applied to offenses wherein the person did not experience sexual gratification. Thomas, 138 Wn.2d at 636. Under the Court of Appeals' reasoning, crimes that are inherently sexual can qualify as a non-sexual offense. For example, voyeurism is an enumerated sex offense. RCW 9.94A.030(47)(a)(i); 9A.44.115. But voyeurism does not require proof that the defendant himself (or herself) experienced sexual gratification.

State v. Diaz-Flores, 148 Wn. App. 911, 919, 201 P.3d 1073 (2009). This Court should adhere to the categorical approach set forth in Thomas.

By requiring an *obscene* exposure of one's sexual reproductive organs, the indecent exposure statute creates an inherently sexual offense. Thus, the sexual motivation aggravator does not apply. This Court should reverse the exceptional sentence and order the sexual motivation findings stricken.

E. CONCLUSION

Aggravating factors are subject to void for vagueness challenges. The rapid recidivism aggravating factor is unconstitutionally vague. And the sexual motivation aggravating factor does not apply to the crime of indecent exposure, an inherently sexual offense. Mr. Murray's exceptional sentence should be reversed and the related findings stricken.

Respectfully submitted this 15th day of September, 2017.

/s Richard W. Lechich
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL MURRAY, Petitioner.	)))))))))	NO. 94346-0

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